As Congress recognized in Section 614(b)(4)(B), must carry rules for DTV might differ in some respects from the analog must carry rules due to technological differences between analog and digital transmissions. ALTV also appreciates that direct application of the analog must carry rules to local television stations' DTV signals in some circumstances might lead to a dysfunctional or arbitrary results. For example, the analog channel positioning rules requires modification because stations' DTV signals never have been carried by cable systems, rendering the channel placement option dates largely meaningless. DTV must carry rules also must be sensitive to the technical capabilities of cable systems. Small analog cable systems with only limited channel capacity might suffer burdens of compliance unjustified by the benefits conferred by the rules. Nonetheless, the basic rule must be carriage. No other interpretation would be consistent with the legal, constitutional, and policy landscape surrounding this proceeding.

ALTV, therefore, proposes the following must carry rules to govern cable carriage of local television stations' DTV signals during the transition:

- Cable systems subject to the rules must carry the DTV signals of all local commercial television stations.
- Any cable television system which transmits one or more digital signals would be subject to the rule immediately. Thus, for example, a cable system which carries a digital signal of a cable network would be subject to the DTV must carry rule. Similarly, any cable system which carried the digital signal of any broadcast television station (local or distant) would be subject to the DTV must carry rule. The rules would apply to all analog, digital, and hybrid digital cable systems, provided they transmitted any digital signal on their systems.
- Large capacity analog cable systems which carried no digital channels also would be required at least to carry and pass through local television stations' DTV signals to their subscribers.

ALTV's proposal maintains carriage as the rule, rather than the exception, thereby preventing cable systems from impeding the transition and threatening the ultimate viability of broadcast DTV. It also maintains competitive parity between digital cable video services and local television stations' DTV programming, as well as among local television stations' DTV signals.

This latter consideration is especially significant to ALTV and its member stations. In the absence must carry rules, many then-independent stations were not carried on local cable systems while their major network-affiliated competitors were carried. Since the reimposition of must carry requirements, these stations, most of which now are affiliates of the Fox, PaxTV, UPN, and WB networks, have begun to thrive, enhancing competition in the video marketplace and providing viewers (cable and noncable alike) with a greater diversity of voices and programming in their markets. Now as they seek to enter the digital age, their success must not hinge on the beneficence of the same cable systems which resisted carrying their analog signals in the past.

1. Cable carriage of every local television stations' DTV signal during the transition period is essential to fulfilling Congress's and the Commission's goals for DTV.

Congress and the Commission have delineated definite goals with respect to the implementation of and transition to full DTV broadcasting. Among those goals expressly acknowledged by the Commission as pertinent in this proceeding are "successful introduction of digital broadcast television and the subsequent recovery of the vacated broadcast spectrum" and "retention of the strength and competitiveness of broadcast television."[54] This recitation of goals reflects a consistent strain of goals mentioned repeatedly throughout the Commission's proceedings looking towards implementation of DTV. Thus, in adopting an expeditious construction schedule for new DTV facilities, the Commission "intended to ensure the preservation of a universally available broadcast service and the swift recovery of analog broadcast spectrum."[55] This reflected the Commission's goals in adopting rules for the conversion of broadcast television from analog to digital:

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[54] *Notice* at ¶1.

[55] *Fourth Annual Competition Report* at ¶94.

> Our goals were to preserve and promote free, universally available, local broadcast television in a digital world, as well as to advance spectrum efficiency and the rapid recovery of spectrum by fostering swift development of DTV.[56]

Promoting free, local broadcast television as a digital service remains paramount:

> An overarching goal of this proceeding is to promote the success of a *free*, local television service using digital technology. Broadcast television's universal availability, appeal, and the programs it provides -- for example, entertainment, sports, local and national news, election results, weather advisories, access for candidates and public interest programming such as education television for children -- have made broadcast television a vital service. It is a service available free of charge to anyone who owns a television set, currently 98% of the population.[57]

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[56]*Reconsideration of Fifth Report and Order* at ¶1.

[57]*Fifth Report and Order* at ¶27. The Court's decision in Turner II underscores that preserving and promoting free, universally available, local broadcast service is an important government interest, particularly with respect to the interests of viewers who rely completely on free, over-the-air television. *Turner II,* 1997 Lexis 2078 at 19-20 (" As noted in Turner, must-carry was designed to serve 'three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.' 512 U. S., at 662. We decided then, and now reaffirm, that each of those is an important governmental interest. We have been most explicit in holding that 'protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest.' Id., at 663 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U. S. 691, 714 (1984)). Forty percent of American households continue to rely on over-the-air signals for television programming. Despite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.' Turner, supra, at 663 (quoting United States v. Southwestern Cable Co., 392 U. S. 157, 177 (1968)). We have identified a corresponding "governmental purpose of the highest order" in ensuring public access to 'a multiplicity of information sources, 512 U. S., at 663.)' *Id.*

The Commission understates the significance of the *Turner* decision, stating that it did not address "the issue of must carry of digital signals." *Notice* at ¶84. However, Turner spoke directly to the underlying statute and upheld it against First Amendment challenge. In any event, the Commission wisely appreciates that it must "take into account the implications of the *Turner II* decision." *Notice* at ¶86. The Commission also at one point seems to discount the significance of free, local broadcasting, in pointing out that:

> Broadcasting may not be the only source of local programming as cable operators have developed local news channels and public, educational, and governmental access channels, which provide highly localized content, have multiplied in the past six years.

Notice at ¶16. Such statements tend to expose the Commission to a charge that it has missed the point -- and a very large point at that. Broadcasting is different from cable is several critical respects. When a local broadcast station provides programming of local interest, addressing local

A strong broadcast DTV service also will enhance competition:

> DTV will also help ensure robust competition in the video market that will bring more choices at less cost to American consumers. Particularly given the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to encourage broadcasters to offer digital television as soon as possible. We make decisions today designed to promote the viability of digital television services. Digital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital. In addition, broadcasters' ability to adapt their services to meet consumer demand will be critical to a successful initiation of DTV.[58]

Thus, the Commission has sought "to promote broadcasters' ability to build digital businesses so that their valuable free programming service will continue."[59]

Part and parcel of the Commission's goals is a speedy transition:

> [D]igital broadcast television stands a risk of failing unless it is rolled out quickly. Many operators in other media such, as DBS, cable, and wireless cable use or plan to use digital technology. Unless digital television broadcasting is available quickly, other digital services may achieve levels of penetration that could preclude the success of over-the-air, digital television. Viewers who have leased or purchased digital set-top boxes from competing digital media may be less likely to purchase DTV receivers or converters. If digital, over-the-air television does not succeed, however, viewers will be without a free, universally available digital programming service.[60]

The Commission considers rapid recovery of spectrum an overarching goal, as well:

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respects. When a local broadcast station provides programming of local interest, addressing local events, issues, interests, and concerns, that programming is universally available to its community and it is free for all.

[58] *Fifth Report and Order* at ¶5.

[59] *Fifth Report and Order* at ¶60.

[60] *Fifth Report and Order* at ¶80.

> One of our overarching goals in this proceeding is the rapid establishment of successful digital broadcast services that will attract viewers from analog to DTV technology, so that the analog spectrum can be recovered.[61]

The speed of the DTV roll-out is critical not only with respect to preserving and promoting consumer access to free, local DTV broadcast service, but also to promoting spectrum efficiency:

> We wish to promote spectrum efficiency and rapid recovery of spectrum. Decisions that promote the success of digital television -- our first goal -- promote this goal as well. The more quickly that broadcasters and consumers move to digital, the more rapidly spectrum can be recovered and then be reallocated or reassigned, or both. The faster broadcasters roll out digital television, the earlier we can recover spectrum.[62]

As the Commission has so rightly concluded:

> The viability of digital broadcast television will require millions of Americans to purchase digital television equipment. Because of the advantages to the American public of digital technology -- both in terms of services and in terms of efficient spectrum management -- our rules *must strengthen, not hamper,* the possibilities for broadcast DTV's success.[63]

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[61]*Fifth Report and Order* at ¶97; *See also Reconsideration of Fifth Report and Order* at ¶79 ("It stated that one of its overarching goals in this proceeding is the rapid establishment of successful digital broadcast services that will attract viewers from analog to DTV technology, so that the analog spectrum can be recovered.").

[62]*Fifth Report and Order* at ¶6.

[63]*Fifth Report and Order* at ¶3 [emphasis supplied]. Another benefit of a rapid transition, according to the Commission, is the promotion of U.S. interests in a global marketplace:

> [A] rapid construction period will promote DTV's competitive strength internationally, as well as domestically. Other countries are moving swiftly to establish their own terrestrial digital television services. For example, the United Kingdom is scheduled to begin broadcasting terrestrial digital television by 1998 or earlier. Japan has recently announced that it will move from analog high definition television to digital television. Neither European nor Japanese digital standards are compatible with the U.S. standard. In the DTV Standard proceeding, equipment manufacturers and labor unions argued that quick and decisive action was necessary to permit American companies to compete internationally. The National Telecommunications and Information Administration and the Office of Science and Technology Policy argued that absent quick action, America might relinquish its technological lead to international competitors, while rapid adoption would spur the American economy in terms of manufacturing, trade, technological development, international investment, and job growth. Rapid introduction of digital television in the U.S. will help facilitate its adoption abroad.

Id. at 81.

Nothing more assuredly could hamper the success of DTV than a video marketplace in which cable systems are left to place their economic interests above the public interest *vis-a-vis* carriage of local broadcast stations' DTV signals.[64]

Congress and the Commission have acknowledged the significance of cable carriage to the speed of the transition and the ultimate success of DTV.[65] A cable system's failure to carry even a few local DTV signals in a market would thwart fulfillment of the Commission's goals. The successful transition of every local television station to DTV is important. The Commission has stated:

> We continue to believe that our primary allotment objective should be to develop a DTV Table that provides a channel for *all eligible broadcasters*. This approach will promote an orderly transition to the new service by ensuring that all eligible full service broadcasters are able to provide digital service. Our decision to accommodate all eligible broadcasters is also consistent with the provisions of the 1996 Telecommunications Act regarding initial eligibility for DTV licenses. We disagree with those parties that suggest we provide allotments for fewer than all full service licensees....[66]

The Commission wants every DTV station to be competitive:

> In considering the DTV power issue, we believe that it is important to adopt an approach that provides for a high degree of service replication *by all stations*, while

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[64]As Haring posits:

> The basic economic rationale for carriage rules is that cable system operators, in evaluating carriage decisions, will systematically fail to take into account economically relevant costs and benefits. Where they fail to reckon costs and benefits accurately, their carriage decisions will not be economically efficient and economic welfare will not be maximized. In this circumstance, the potential exists for an increase in economic welfare through government intervention that leads to carriage decisions more consistent with economic efficiency.

Economic Case at 3.

[65]*Notice* at ¶12 ("As the statutory language indicates, the return of the analog spectrum is in part dependent on the carriage of digital television stations by cable operators and other multichannel video programming distributors.").

[66]*Sixth Report and Order* at ¶11 [emphasis supplied].

> at the same time ensuring that all stations are able to provide DTV service competitively within their respective markets.[67]

The Commission's DTV implementation policies have been guided by the notion of preserving the ability of all local television stations to serve the areas they now serve with their analog signals. This is considered essential to the successful transition to DTV:

> We continue to believe that the most advantageous approach for assignment of DTV channels is to match stations with the channel that best replicates their existing service areas. We agree with the commenting parties that this approach will preserve both viewers' access to the existing stations in their market and stations' access to their existing populations of viewers, and thereby ensure an orderly transition to DTV service for both commercial and noncommercial stations.[68]

The Commission's concern for the competitive vitality of every local television station is entirely appropriate and fully consistent with Section 614. As the Court stated in *Turner II*:

> Congress' evident interest in "preserving the existing structure," 512 U. S., at 652, of the broadcast industry discloses a purpose to prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households. To the extent the appellants question the substantiality of the Government's interest in preserving something more than a minimum number of stations in each community, their position is meritless. It is for Congress to decide how much local broadcast television should be preserved for noncable households, and the validity of its determination "'does not turn on a judge's agreement with the responsible decisionmaker concerning' . . . the degree to which [the Government's] interests should be promoted." Ward, 491 U. S., at 800 (quoting United States v. Albertini, 472 U. S. 675, 689 (1985)); accord, Clark v. Community for Creative Non-Violence, 468 U. S. 288, 299 (1984) ("We do not believe . . . [that] United States v. O'Brien . . . endows the judiciary with the competence to judge how much protection of park lands is wise").[69]

In enacting Section 614, Congress decided that carriage of *all local stations* was necessary. No less may be said in the case of local television stations' DTV signals.

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[67]*Sixth Report and Order* at ¶30 [emphasis supplied].

[68]*Notice* at ¶89; *see also Reconsideration of Sixth Report and Order* at ¶25 ("We reaffirm our approach to provide all eligible broadcasters with the temporary use of a second channel that, to the extent possible, will allow them to replicate the service areas of their existing NTSC operations. We continue to find that such an approach will promote the orderly transition of DTV by broadcasters and foster the provision of service to the public.").

[69]*Turner II*, 1997 Lexis 2078 at 25-26.

Lack of DTV must carry rules would have a devastating effect on the Commission's efforts to roll-out free, broadcast DTV rapidly. According to the Commission, "The viability of digital broadcast television will require millions of Americans to purchase digital television equipment."[70] Ramping up consumer demand for DTV depends on stations' initiating DTV service quickly. All of this depends on stations' attracting viewers to their DTV signals.[71] No station which is denied access to some 65 percent of viewers can attract the viewers necessary to engender broad consumer acceptance or encourage expeditious expenditures to implement DTV operation fully at their stations. Why would a consumer purchase a set if its cable system stands as a barrier to the consumer's access to local broadcast stations' DTV signals? Stations denied access to a majority of their audience potential audience ultimately are doomed. The record compiled in *Turner II* amply confirmed this basic reality, as shown by the following excerpts from the Court's decision:

- The harm Congress feared was that stations dropped or denied carriage would be at a "serious risk of financial difficulty," and would "deteriorate to a substantial degree or fail altogether." Congress had before it substantial evidence to support its conclusion.
- Congress was advised that the viability of a broadcast station depends to a material extent on its ability to secure cable carriage. One broadcast industry executive explained it this way:

> Simply put, a television station's audience size directly translates into revenue -- large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion

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[70] *Notice* at 3.

[71] *Fifth Report and Order* at ¶5 ("Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television's unique benefit: free, widely accessible programming that serves the public interest. DTV will also help ensure robust competition in the video market that will bring more choices at less cost to American consumers. Particularly given the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to encourage broadcasters to offer digital television as soon as possible. We make decisions today designed to promote the viability of digital television services. Digital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital.").

of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat.

- Empirical research in the record before Congress confirmed the "'direct correlation [between] size in audience and station [advertising] revenues,'" and that viewership was in turn heavily dependent on cable carriage.
- Considerable evidence, consisting of statements compiled from dozens of broadcasters who testified before Congress and the FCC, confirmed that broadcast stations had fallen into bankruptcy, curtailed their broadcast operations, and suffered serious reductions in operating revenues as a result of adverse carriage decisions by cable systems.
- The record also reflected substantial evidence that stations without cable carriage encountered severe difficulties obtaining financing for operations, reflecting the financial markets' judgment that the prospects are poor for broadcasters unable to secure carriage.
- Evidence before Congress suggested the potential adverse impact of losing carriage was increasing as the growth of clustering gave MSO's centralized control over more local markets.
- Another study prepared by a large MSO in 1993 concluded that "with cable penetration now exceeding 70% in many markets, the ability of a broadcast television station to easily reach its audience through cable television is crucial."[72]

In the case of DTV signals, with audiences already limited by the limited number of DTV receivers and questions remaining about the reliability of off-air reception, cable carriage is even more critical.[73]

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[72] *Turner II* , 1997 LEXIS 2078, 50-54.

[73] *Economic Case* at 12, where Haring points out:

Digital technology certainly has the potential to produce images of very high quality, but as the Commission is well aware, there are some difficulties unique to reproduction of digital transmissions that must be considered in reckoning the need for carriage requirements. Unlike analog broadcasts which may suffer a variety of degradations diminishing reception quality but nevertheless remain viewable, partial loss of digital program information may result in complete loss of reception on an intermittent basis — the so-called "cliff effect." The cliff effect can be caused by insufficient signal strength at particular locations and also by the problem of multipath interference which involves the mistiming of signals arriving at a receiver antenna.

The fall-out of reduced audiences and revenues for local stations' DTV programming extends well beyond the "P&Ls" of local stations. A vicious and destructive cycle will ensue. The new DTV broadcast channels will have fewer viewers and less revenue-generating potential and concomitantly little incentive to invest in digital and HDTV studio and production equipment and new digital programming.[74] Consumers will have less incentive to acquire digital sets because local television stations' DTV programming is lackluster, in turn, further reducing DTV audience and revenues and so on. Haring states:

> A useful way to think about the question of digital must carry is simply to consider how broadcaster incentives will be affected by the absence of such requirements: Will such absence enhance or detract from incentives to make "transition-friendly" investments? There is a queue of potential investments a broadcaster can undertake to implement digital broadcasting. It can simply invest in a capability that permits the pass-through of network programming. It can invest in more sophisticated capabilities that afford the ability to transmit live feeds or locally produced programs. How much it selects to do depends on the expected returns. If, in the absence of a carriage requirement, a small(er) audience is anticipated, smaller investments will be sunk. There is likely to be a problem of self-fulfilling prophecy

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While the FCC has sought to address signal coverage problems by increasing power authorizations for some stations, the significance and impact of the multipath problem remains unknown. Similarly, uncertainties remain about ease of digital broadcast reception using a simple indoor/set-top antenna. The standards embodied in the ATSC digital system specifications contemplate use of an outdoor antenna for reception of digital broadcasts. An outdoor antenna is a hassle for consumers; indeed, for many use of an outdoor antenna is forbidden by community planning covenants.

In these circumstances, broadcasters are, in essence, at the mercy of the set manufacturers and cable system operators. The set manufacturers — at a cost — may be able to design a correction capability and embody it in the receiver to address the mistiming problem. Alternatively, these reception difficulties can be addressed through a cable carriage requirement much as the existing carriage requirements address disabilities associated with reception of over-air-broadcasts.

[74]*Economic Case* at 13. As observed so correctly in *Broadcasting &Cable Online*:

Cable's role in the DTV game is crucial because about 65% of all the U.S. Television households get cable. Thus, in order for set makers to drive penetration of HDTV sets, the cable industry has to step up and deliver HDTV.

"Lines drawn on HDTV," *Broadcasting &Cable Online* (posted February 5, 1998) at 2.

> as the expectation of small audiences provokes minimal efforts that elicit small audiences, and so on.[75]

In a worst case, a local television station might throw up its hands and abandon plans to build digital facilities or limit its involvement in digital to pass through of network programming. This would frustrate achievement of the Commission's goal "to preserve for viewers the public good of free television that is widely available today."[76]

Furthermore, set penetration easily may fall short of levels essential to end the transition in 2006 and permit return of the analog spectrum. The Commission recognizes that the success of the DTV transition depends on the availability of DTV service to a significant number of households as quickly as possible:

> To aid the launch of digital services, we provide for a rapid construction of digital facilities by network-affiliated stations in the top markets, in order to expose a significant number of households, as early as possible, to the benefits of DTV. We require those most able to bear the risks of introducing digital television to proceed most quickly. Our decisions here will foster the swift development of DTV, which should enable us to meet our target of ending NTSC service by 2006.[77]

As Haring emphasizes, the successful and timely roll-out of DTV depends on a number of interrelated factors.[78] Like a recipe for a savory, but delicate sauce, all the ingredients must present in correct proportion and added at just the right time. Cable carriage of DTV signals is just such an essential ingredient of the Commission's recipe for the success of DTV. Consumers, most of whom are cable subscribers, will have less incentive to acquire new digital sets if they are denied local stations' DTV signals on their cable systems. Thus, decreased demand will lower sales, in turn, reducing economies scale in the manufacture of sets. Anticipated price drops will not occur,

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75 *Economic Case* at 14.

76 *Fifth Report and Order* at ¶29.

77 *Fifth Report and Order* at ¶7.

78 *Economic Case* at 9.

at least as rapidly as expected. Higher prices will reduce demand, and the cycle begins again.[79]

Haring states:

> A key measure of, as well as an important factor determining, the success of the digital broadcast transition will be the pace at which consumers actually acquire digital reception capability and purchase DTV sets. DTV receiver and set-top box penetration is what will ultimately trigger the reversion of the existing analog broadcast spectrum to the government for reconfiguration and reassignment. It also is, at the same time, a key input into economic models that predict the trajectory of DTV penetration through time. Because the rate of cost and price declines of DTV sets (produced by exploitation of economies of large scale production and learning by doing in manufacturing processes) and related equipment is itself a function of adoption rates, the early pace of adoption will affect subsequent rates. The faster equipment manufacturers can move down the relevant costs curves, the faster will prices drop and the faster will DTV set penetration occur, culminating in the successful completion of the desired transition.[80]

Consequently, the speed of the transition will be slowed materially.

In sum, if cable systems fail to carry the DTV signals of local television stations, the already frail economics of broadcast DTV will crumble. Cycles of despair will displace progress towards a timely, complete transition. The Commission's hopes and dreams that consumers in a digital world would be enriched by a burgeoning array of highly attractive broadcast DTV program channels and services would be shattered. As Haring warns:

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[79]Television receiver manufacturers consider must carry rules essential to a successful transition to DTV:

> [A] successful transition will only occur if these wonderful new television services are available to all Americans, including cable viewers. That is why it is absolutely essential that you instruct the FCC to require that cable companies carry the broadcasters' full digital television signals, including HDTV.
>
> * * *
>
> Broadcaster investment in digital transmission equipment and consumer investment in new digital television sets mean nothing if the local cable operator refuses to pass the digital signals through.
>
> Statement of Gary Shapiro, President, EIA's Consumer Electronics Manufacturers Association, before the Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection (April 23, 1998) at 3.

[80]*Economic Case* at 10.

Having specified a plan for transition to digital broadcasting and mandated that broadcasters implement digital broadcasts, it would seem contradictory, to say the least, to fail to specify carriage requirements which operate economically to validate those investments. Indeed, given the economic incentive and ability of cable MVPD monopolists, in effect, to sabotage the effectiveness of those investments and to subvert the transition the government for policy reasons has deemed worthy, failure to specify such requirements would amount to a regulatory "Bay of Pigs" — lack of must-carry "air cover" leaving broadcaster investments in digital capabilities exposed to cable monopoly "firepower" on the beaches.[81]

2. Cable carriage of all local television stations' DTV signals can be assured only through adoption of DTV must carry rules.

The must carry law was enacted precisely because cable systems were monopoly gatekeepers with the ability and incentive to foreclose competition from local broadcast stations. This is no less true for local television stations' DTV broadcast signals than for their analog signals. Cable systems' remain monopoly gatekeepers. Their ability to interdict viewer access to broadcast signals (analog or digital) is intact. Their incentives to foreclose competition, if anything, are more intense with respect to local television station's digital signals.

[81] *Economic Case* at 14-15. Analog television, meanwhile, would remain a teetering, vestigial service, but one which could not be abandoned because the blossoming of broadcast DTV had been withered by lack of access to the bulk of its potential audience.

First, nothing has occurred to disturb the basic findings underlying the must carry law.[82]

82In *Turner II*, 1997 Lexis 2078, 31-34, the Court stated:

As to the evidence before Congress, there was specific support for its conclusion that cable operators had considerable and growing market power over local video programming markets. Cable served at least 60 percent of American households in 1992, see Cable Act @ 2(a)(3), and evidence indicated cable market penetration was projected to grow beyond 70 percent. See Cable TV Consumer Protection Act of 1991: Hearing on S. 12 before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 102d Cong., 1st Sess., 259 (1991) (statement of Edward O. Fritts) (App. 1253); see also Defendants' Joint Statement of Evidence Before Congress PP9, 10 (JSCR) (App. 1252-1253). As Congress noted (@ 2(a)(2)), cable operators possess a local monopoly over cable households. Only one percent of communities are served by more than one cable system, JSCR PP31-40 (App. 1262-1266). Even in communities with two or more cable systems, in the typical case each system has a local monopoly over its subscribers. See Comments of NAB before the FCC on MM Docket No. 85-349, P47 (April 25, 1986) (App. 26). Cable operators thus exercise "control over most (if not all) of the television programming that is channeled into the subscriber's home. . . . [and] can thus silence the voice of competing speakers with a mere flick of the switch." Turner, 512 U. S., at 656.

Evidence indicated the structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations from their systems, or reposition them to a less-viewed channel. Horizontal concentration was increasing as a small number of multiple system operators (MSO's) acquired large numbers of cable systems nationwide. @ 2(a)(4). The trend was accelerating, giving the MSO's increasing market power. In 1985, the 10 largest MSO's controlled cable systems serving slightly less than 42 percent of all cable subscribers; by 1989, the figure was nearly 54 percent. JSCR P77 (App. 1282); Competitive Problems in the Cable Television Industry, Hearing before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary, 101st Cong., 1st Sess., 74 (1990) (Hearing on Competitive Problems in the Cable Television Industry) (statement of Gene Kimmelman and Dr. Mark N. Cooper).

Vertical integration in the industry also was increasing. As Congress was aware, many MSO's owned or had affiliation agreements with cable programmers. @ 2(a)(5); Senate Report, at 24-29. Evidence indicated that before 1984 cable operators had equity interests in 38 percent of cable programming networks. In the late 1980's, 64 percent of new cable programmers were held in vertical ownership. JSCR P197 (App. 1332-1333). Congress concluded that "vertical integration gives cable operators the incentive and ability to favor their affiliated programming services" (@ 2(a)(5); Senate Report, at 25) a conclusion that even Judge Williams' dissent conceded to be reasonable. See 910 F. Supp., at 775. Extensive testimony indicated that cable operators would have an incentive to drop local broadcasters and to favor affiliated programmers. See, e.g., Competitive Issues in the Cable Television Industry: Hearing before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary, 100th Cong., 2d Sess., 546 (1988) (Hearing on Competitive Issues) (statement of Milton Maltz); Cable Television Regulation: Hearings on H. R. 1303 and H. R. 2546 before the

No less today than in 1992:

- Cable systems pass nearly all television households and provide the only multichannel video service to over 65 percent of television households.[83]
- Cable television continues to grow in subscribership, homes passed, penetration, premium subscriptions, viewership, and channel capacity.[84] Notably, the expansion on non-cable MVPDs has had no significant effect on cable subscribership.[85]
- Cable systems almost invariably maintain their monopoly status as the only multichannel video program provider in cable households.[86]

Cable Television Regulation: Hearings on H. R. 1303 and H. R. 2546 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 102d Cong., 1st Sess., 869-870, 878-879 (Hearings on Cable Television Regulation) (statement of James B. Hedlund); id., at 752 (statement of Edward O. Fritts); id., at 699 (statement of Gene Kimmelman); Cable Television Regulation (Part 2): Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 101st Cong., 2d Sess., 261 (1990) (Hearings on Cable Television Regulation (Part 2)) (statement of Robert G. Picard) (App. 1339-1341); see also JSCR PP168-170, 278-280 (App. 1320-1321, 1370-1371).

[83]*Fourth Annual Competition Report* at ¶14.

[84]*Fourth Annual Competition Report* at ¶13.

[85]*Fourth Annual Competition Report* at ¶128.

[86]Only 81 communities have franchised overbuilds (*i.e.,* two cable systems competing head-to-head for the same households.). These franchises, if built out, would provide competing cable service in 5.43 million households (barely over five percent of all television households). However, many of these franchises have been awarded to local exchange carriers (LECs), which now appear less inclined to build their cable systems. *Fourth Annual Competition Report* at ¶¶33, 112-114. Perhaps, the LECS have come to recognize the economic folly of overbuilding. As then TCI president and CEO John Malone testified:

> [I]t is not economically viable to sustain two wires into the home providing, essentially, equivalent services. Because all you do there is double the capital cost, double the operating expenses, or raise them by 150 percent and split the revenues in half.

Hearings before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 101st. Cong., 2d Sess. (November 16-17, 1989) at 166.

- Horizontal concentration continues to be substantial and growing.[87]
- Vertical integration, principally involving the largest cable operators, has increased. Cable MSOs own 50 percent or more of 50 cable networks.[88] The eight largest MSOs have a stake in all 68 vertically integrated cable networks.[89]
- Cable operators continue to control the flow of programming into the home, enabling them to interdict and foreclose consumer access to competitive programming.[90] They still may "silence the voice of competing speakers with a mere flick of the switch."[91]

This strangle hold on the conduit of video programming to a substantial majority of television households leaves cable systems with the ability to stand as gatekeepers for the signals of local television stations whether they be digital or analog.[92]

Second, cable systems couple considerable *incentives* to deny carriage to their *ability* to do so. In the case of DTV signals, these incentives are even greater than in the case of analog signals. Again, no reason exists to discount the very same incentives which prompted Congress to enact -- and the Court to uphold -- Section 614. First, vertical integration remains substantial, providing, as the Commission observes, the opportunity to "deter entry and competition in the video

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87*Fourth Annual Competition Report* at ¶151. The top four firms (TCI, Time Warner, MediaOne, and Comcast) now serve 54.3 percent of all MVPD subscribers. *Id.*

88*Fourth Annual Competition Report* at ¶159, 161.

89*Fourth Annual Competition Report* at ¶161.

90The Commission wonders whether A-B switches and off-air antennas have been or might be resurrected to provide an alternative path for DTV signals into the home. *Notice* at ¶16. As set forth, *infra*, however, the proliferation of effective off-air reception capability is unlikely.

91 *Turner II*, 1997 LEXIS 2078, 58.

92Indeed, the mere fact of conduit control is core consideration. That local cable systems' failure to carry a local station's signal would vanquish the station at a 65 percent penetration level cannot obscure the fact that the local station would be competitively damaged at a lesser level of penetration. *See also Economic Case* at 6, n.11.

marketplace, and ... limit the diversity of cable programming, reducing the number of voices available to the public."[93] Substantial evidence before Congress, supplemented by additional evidence gathered in the appeal of the rules, left no doubt that cable systems had every incentive to favor their vertically-integrated program services over local broadcast stations.[94] No reason exists for this incentive to abate. Large cable MSOs continue to launch new networks, all of which must gain carriage in order to succeed.[95] Furthermore, cable networks like vertically integrated HBO are leading the cable path to digital. These new cable digital services will become the direct competitors of local broadcast station's DTV offerings.

Second, cable and broadcast television remain competitors at the national and local levels. The Commission also recently observed, "Broadcast networks and stations are competitors to other MVPDs in the advertising and program acquisition markets."[96] As stated by the Court in *Turner II*:

> Cable systems also have more systemic reasons for seeking to disadvantage broadcast stations: Simply stated, cable has little interest in assisting, through carriage, a competing medium of communication. As one cable-industry executive put it, "'our job is to promote cable television, not broadcast television.'"
>
> Congress could therefore reasonably conclude that cable systems would drop broadcasters in favor of programmers--even unaffiliated ones--less likely to compete with them for audience and advertisers.[97]

Furthermore, the Court found:

> Empirical studies indicate that cable-carried broadcasters so enhance competition for advertising that even modest increases in the numbers of broadcast stations carried

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[93] *Fourth Annual Competition Report* at ¶157.

[94] *Turner II*, 1997 Lexis 2078, 33-34, 36-37.

[95] *Fourth Annual Competition Report* at ¶¶163, 165.

[96] *Fourth Annual Competition Report* at ¶90. Even among cable subscribers broadcast station programming garners most viewing. *Id.* at 92.

[97] *Turner II*, 1997 LEXIS 2078, 38-40 [citations omitted].

on cable are correlated with significant decreases in advertising revenue to cable systems.[98]

Advertising has become increasingly significant *post-Turner II.* Annual cable ad revenues approach eight billion dollars.[99] The attractiveness of advertising as a revenue stream is understandable. The margin is high because monthly subscriber fees cover the bulk of a system's costs. Furthermore, they provide incremental revenue without risking subscriber defections, as might occur if subscriber fees were increased. Finally, ad revenues take on greater significance as cable subscribership levels off and rate regulation damps subscriber fee increases. Cable's increasingly energetic pursuit of ad revenues is revealed most starkly in the cable industries continuing drive towards clustering of commonly-owned systems in the same market.[100]

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[98] *Turner II,* 1997 LEXIS 2078, 37-38.

[99] *Fourth Annual Competition Report* at¶23.

[100] *Fourth Annual Competition Report* at ¶141 ("The growing importance of advertising revenue for cable systems has emerged as a major factor promoting regional consolidation....This assures advertisers they will get extensive regional market coverage."). The Court in Turner also had noted the significance of clustering with respect to cable advertising sales:

> The evidence on remand also indicated that the growth of cable systems' market power proceeded apace. The trend towards greater horizontal concentration continued, driven by "enhanced growth prospects for advertising sales." Paul Kagan Assocs., Inc, Cable TV Advertising 1 (Sept. 30, 1994) (App. 301). By 1994, the 10 largest MSO's controlled 63 percent of cable systems, Notice of Inquiry, In re Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, 10 FCC Rcd. 7805, 7819-7820, P79 (1995), a figure projected to have risen to 85 percent by the end of 1996. DAE Vol. VII.D, Exh. 80, at 1 (Turner [*48] Broadcasting memo); Noll Declaration P26 (App. 1017). MSO's began to gain control of as many cable systems in a given market as they could, in a trend known as "clustering." JSCR PP150-153 (App. 1311-1313). Cable systems looked increasingly to advertising (and especially local advertising) for revenue growth, see, e.g., Paul Kagan Associates, Inc., Cable TV Advertising 1 (July 28, 1993) (App. 251); 1 R. Bilotti, D. Hansen, & R. MacDonald, The Cable Television Industry 94-97 (Mar. 8, 1993) (DAE Vol. VII.K, Exh. 232, at 94-97) ("Local advertising revenue is an exceptional incremental revenue opportunity for the cable television industry") Memo from Arts & Entertainment Network, dated Oct. 26, 1992, p. 2 (DAE Vol. VII.K, Exh. 235) (discussing "huge growth on the horizon" for spot advertising revenue), and cable systems had increasing incentives to drop local broadcasters in favor of cable programmers (whether affiliated or not). See Noll Declaration PP29-31 (App. 1018-1020). The

Third, having a large number of stations in a market tends to reduce cable subscribership and premium channel subscriptions.[101]

Fourth, the effectiveness of a local broadcast station as a competitor to cable is in large part a function of cable carriage. In this regard, the Court concluded:

> The ability of broadcast stations to compete for advertising is greatly increased by cable carriage, which increases viewership substantially. With expanded viewership, broadcast presents a more competitive medium for television advertising.[102]

This creates an enormous incentive for a cable operator to drop a local station.[103]

Fifth, the commencement of DTV only will enhance broadcasting as competition to cable television. Thus, as the Commission has stated:

> vertical integration of the cable industry also continued, so by 1994, MSO's serving about 70 percent of the Nation's cable subscribers held equity interests in cable programmers. See In re Implementation [*49] of Section 19 of Cable Television Protection and Competition Act of 1992, First Report, 9 FCC Rcd 7442, 7526, P167, and nn. 455, 457 (1994); id., app. G, tables 9-10; Top 100 MSO's as of October 1, 1994 (DAE Vol. VII.K, Exh. 266); see also JSCR PP199, 204 (App. 1334, 1336). The FTC study the dissent cites, post, at 15, takes a skeptical view of the potential for cable systems to engage in anticompetitive behavior, but concedes the risk of anticompetitive carriage denials is "most plausible" when "the cable system's franchise area is large relative to the local area served by the affected broadcast station," Reply Comment of FTC, at 20 (App. 177), and when "a system's penetration rate is both high and relatively unresponsive to the system's carriage decisions," id., at 18 (App. 175). That describes "precisely what is happening" as large cable operators expand their control over individual markets through clustering. Second Meek Declaration P35 (App. 1867). As they do so, they are better able to sell their own reach to potential advertisers, and to limit the access of broad-cast competitors by denying them access to all or substantially all the cable homes in the market [*50] area. Ibid.; accord Noll Declaration P24 (App. 1015).

Turner II, 1997 LEXIS 2078, 48-50.

101 *Turner II,* 1997 LEXIS 2078, 37-38.

102 *Turner II,* 1997 LEXIS 2078, 38 [citations omitted].

103 Broadcast stations and networks still have large audiences. The six broadcast networks have maintained a 68 percent share of total audience in prime time. *Fourth Annual Competition Report* at ¶92.

> With the introduction of DTV technology we are now on the threshold of major changes in broadcast television. This new technology will open the door to dramatic changes in the nature of broadcast television, allowing broadcasters to offer high definition television service, with major improvements in picture quality, compact-disc quality audio signals, simultaneous multiple program services ("multicasting"), and data services. Broadcasters will also have the flexibility to switch easily and quickly the types of services they provide and amount of their total digital bit stream that is used for each type of service. These new capabilities will allow broadcasters to offer immediate and significant improvements in the service they provide to the public and provide them the flexibility to alter their mix of services or add new services in response to viewer demand and future technical advances. The advent of digital television service will also promote greater competition within the broadcast industry by providing individual broadcasters with greater ability to differentiate their services from those of other broadcasters. In addition, the *expanded service capabilities provided by the new DTV system will enhance the ability of broadcasters to compete with other video services such as cable television,* direct broadcast satellite service and others.[104]

In like vein, the Commission also has noted:

> DTV has the potential to allow the broadcasters to become more effective competitors with cable companies in the MVPD market....Once broadcast stations convert from analog to digital television...they will have the option to offer multiple channels of video service during all or part of the broadcast day.[105]

The ability to provide multiple program channels has provoked such concepts as ten stations in a market like Atlanta providing as many as 100 channels over-the-air.[106] Indeed, with respect to DTV, one survey indicates that "a sizeable percentage of consumers would drop their cable or satellite service if they could receive numerous channels free through digital television."[107] Haring also notes:

> If several of the broadcasters within a given region were to adopt this method of operation (perhaps not exclusively, but for certain parts of the day), digital broadcasting might well be capable of offering more meaningful competition for

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[104] *Reconsideration of the Sixth Report and Order* at ¶2 [emphasis supplied].

[105] *Fourth Annual Competition Report* at¶95.

[106] *USA Today* Tech Report, "CES preview: Going digital means sharper boob tubes," (August 29, 1997).

[107] A.T. Kearney, Inc., survey, as reported in the HDTV Newsletter (January 9, 1998).

> cable, at least at the margin, than is the case today with a more limited number of broadcast offerings.
>
> For some consumers this type of offering might well provide an attractive and economic alternative to monopoly-priced cable service.[108]

A thriving array of digital broadcast stations in a local market, indeed, would be an object of rational fear on the part of a cable operator. It certainly would create an incentive to place any possible roadblock in the way of these new DTV stations' success.

Sixth, no real counter incentive exists to carry *all* local stations. Again, the Court in *Turner II* dealt squarely with the issue:

> The dissent contends Congress could not reasonably conclude cable systems would engage in such predation because cable operators, whose primary source of revenue is subscriptions, would not risk dropping a widely viewed broadcast station in order to capture advertising revenues. Post, at 12. However, if viewers are faced with the choice of sacrificing a handful of broadcast stations to gain access to dozens of cable channels (plus network affiliates), it is likely they would still subscribe to cable even if they would prefer the dropped television stations to the cable programming that replaced them. Substantial evidence introduced on remand bears this out: With the exception of a handful of very popular broadcast stations (typically network affiliates), a cable system's choice between carrying a cable programmer or broadcast station has little or no effect on cable subscriptions, and subscribership thus typically does not bear on [*41] carriage decisions. Noll Declaration P29 (App. 1018-1019); Rebuttal Declaration of Roger G. Noll P20 (App. 1798); Reply Declaration of Roger G. Noll PP3-4, and n. 3 (App. 2003-2004); see also Declaration of John R. Haring P37 (Haring Declaration) (App. 1106).[109]

Haring contends as well that:

> While non-subscribers thus derive benefits from cable carriage of broadcast signals, cable system operators cannot be reasonably expected to take these (economically "external") benefits into account in reckoning the benefits of carriage of a broadcast signal. There will, in consequence, be a systematic tendency toward "under-carriage" of broadcast signals relative to the norm of economic efficiency. This tendency may be exacerbated by a cable system operator's ownership stake or revenue interest (through sales of advertising avails) in cable channels that compete with broadcast channels. Cable channels carry appropriable benefits whereas a substantial portion of the economic benefits of broadcast channels cannot be

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[108] *Economic Case* at 5.

[109] *Turner II,* 1997 LEXIS 2078, 40-41.

feasibly appropriated by either system operators or, for that matter, broadcasters.[110]

Consequently, cable operators have little, if anything, to lose by refusing to carry at least some local broadcast stations.[111]

History appears inclined to repeat itself as DTV stations commence operations. The same cable industry which refused to carry many analog stations now seems poised to behave no better towards DTV stations.[112] For example, no assurance exists that cable systems will equip their

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[110] *Economic Case* at 6-7.

[111] However, what is significant is not a cable operator's motivation; what is significant is the effect on consumers:

> Federal policy, however, has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust [*27] violation. See Capital Cities Cable, Inc. v. Crisp, 467 U. S., at 714; United States v. Midwest Video Corp., supra, at 665 (plurality opinion) (FCC regulations "were . . . avowedly designed to guard broadcast services from being undermined by unregulated [cable] growth"); National Broadcasting Co. v. United States, 319 U. S. 190, 223-224 (1943) ("'While many of the network practices raise serious questions under the antitrust laws, . . . it is not [the FCC's] function to apply the antitrust laws as such'") (quoting FCC Report on Chain Broadcasting Regulations (1941)). Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression. See Turner, supra, at 663; FCC v. National Citizens Committee for Broadcasting, 436 U. S. 775, 783 (1978) (referring to studies "showing the dominant role of television stations . . . as sources of local news and other information"). Congress has an independent interest in preserving [*28] a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable.

Turner II, 1997 LEXIS 2078, 26-28.

[112] Again, *Turner II* is instructive:

According to one of appellants' own experts, between 19 and 31 percent of all local broadcast stations, including network affiliates, were not carried by the typical cable system. See Declaration of Stanley Besen, Exhs. C-2, C-3 (App. 907-908). Based subscribers with boxes capable of passing through local stations' digital signals.[113] Similarly, even if the local station's digital signal is carried, considerable doubt exists that cable systems would provide the programming in the same format as it was broadcast.[114] TCI's John Malone has been unyielding on that point, insisting that if CBS broadcast a DTV signal in the 1080I format, "they are not getting on my systems.... I'm not saying I can't technologically carry them, but I am not going to voluntarily put them on. No way."[115] Moreover, the cable industry appears reticent to carry multiple SDTV signals which some local television stations may provide on their DTV facilities. In the words of MediaOne Group Senior Vice President Bud Wonsiewicz:

> [A] number of issues ... Are mission critical to us with respect to the broadcasters. One is that we have to control the modulation of our signals so we can use these various spectrally efficient schemes in transmission.

> system. See Declaration of Stanley Besen, Exhs. C-2, C-3 (App. 907-908). Based on the same data, another expert concluded that 47 percent of local independent commercial stations, and 36 percent of noncommercial stations, were not carried by the typical cable system. The rate of noncarriage was even higher for new stations. Third Meek Declaration P4 (App. 2054). Appellees introduced evidence drawn from an empirical study concluding the 1988 FCC survey substantially underestimated the actual number of drops (Declaration of Tom Meek PP5, 25, 36 (Meek Declaration) (App. 619, 625, 626)), and the noncarriage problem grew steadily worse during the period without must-carry. By the time the Cable Act was passed, 1,261 broadcast stations had been dropped for at least one year, in a total of 7,945 incidents. Id., PP12, 15 (App. 621, 622).
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> *Turner II,* 1997 LEXIS 2078, 45.

113"Sorting out the digital mess," CNET NEWS.COM (April 8, 1998); *see also* "will cable be ready for HDTV?" *Broadcasting &Cable* (March 9, 1998) at 43.

114"Digital TV, the real story"; *see also* "TV Cable-Box Software May Blur Digital Signals," *CyberTimes* (February 23, 1998) at 1 ("[W]hen digital television broadcasts begin, Windows CE, the Microsoft operating system that is to be built into the boxes, will convert those programs for display on analog sets -- but only if they are broadcast in the lower resolution progressive format set out in the computer industry's proposal."); "TCI's Malone," *supra,* at 4 ("I'm also going to approach friendly broadcasters and suggest we do bilateral deals, you know, like right now. And my willingness to do those will be contingent upon the technology that we can agree on.").

115"TCI's Malone," *supra*, at 8.

> We must avoid getting into a box where the broadcaster uses their [*sic*] channel allocation to package in multiple standard digital signals and forces us to use the spectrum in that way.
>
> ....[W]e are not in the business of having our spectrum expropriated for...standard definition.[116]

Although the Commission's rules for DTV ultimately require simulcasting, cable operators already are balking at carriage of simulcast DTV signals. In the words of Cablelabs president and CEO Richard Green:

> The cable industry is concerned with quality programs for our viewers. When broadcasters produce the programs in high-definition that people want to see, obviously we'll carry them. If there are simulcast programs, there are going to be some questions about that....It ought not to follow some federally-mandated guideline that requires reception of the same material without innovative marketplace activity.[117]

Local broadcasters can be nothing but fearful when they see reports that the "triumvirate" that will "bring about digitization of telecommunications and video entertainment" includes only "c" words -- cable, computer, and consumer electronics. Left out of the picture (so to speak): broadcast television.[118] They see the largest cable MSO, TCI, and its primary trade association, NCTA, openly opposed to must carry.[119] Thus, local television stations know that, left in the hands of local cable systems, their DTV signals have no assurance of carriage.

116"SCTE lobbied for digital unity," *Electronic Media* (June 15, 1998) at 10, 51.

117"Cablelabs, Opening the door to digital," *Broadcasting &Cable* (May 4, 1998) at 68.

118 "Cablelabs, Opening the door to digital," *Broadcasting &Cable* (May 4, 1998) at 64.

119"Hindery sees capital improvement," *Broadcasting &Cable* (May 4, 1998) at 102; "NCTA opposes digital must carry," *Broadcasting &Cable* (April 27, 1998) at 42. Indeed, One well-known TCI executive is quoted as saying, "We'll fight 'must carry' to the death." "Big Cable Company Fighting New CBS and NBC Signals," *NYT on the Web* (May 6, 1998).

Negotiations between stations and cable operators also offer little promise of assured carriage, particularly for ALTV's member stations.[120] Private negotiations among large MSOs and the major broadcast networks will leave their DTV signals off cable systems. TCI President Leo Hindery reportedly has stated that "[B]roadcast networks and cable operators should successfully complete negotiations on implementing digital television and retransmission consent deals before the fall."[121] TCI Chairman and CEO John Malone in speaking with reporters on May 5, 1998, at the NCTA convention, said:

> It's clear to us that we can make deals with Fox and Disney. It's sort of clear to me that I can make a deal with NBC. I don't know whether I can make a deal with CBS. I'm sure I can make a deal with PBS.[122]
>
> And then the independent stations, I think we have a fair degree of leverage over because of our transport -- so I'm sure we can make deals with them.[123]

Mr. Malone's "fair degree of leverage" over "independents" provides no solace whatsoever. Maybe ALTV's member stations will be carried; maybe, not. If so, on what terms? In which format? Mr. Malone's appreciation of the relative bargaining position of the parties suggests that he will drive hard bargains. What happens if a local television station can make no deal for carriage on cables' terms? Mr. Malone has the answer:

> [I]f one of the broadcasters hangs in at 1080i...there will be no general agreement reached and it'll be a marketplace driven agreement and we'll just start going ahead

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120The goal of such agreements, of course, is to avoid "a situation where must carry is necessary." "Opening the door," *supra*, *Broadcasting &Cable* (May 4, 1998) at 70.

121"Hindery sees DTV deals before fall," *Broadcasting &Cable* (July 27, 1998) at 36.

122However, in another report, a CBS spokesman stated that "the network is engaging in 'mutually beneficial' carriage agreements with the entire cable industry, including wireless operators." "Wireless industry raises alarm on digital TV," *Electronic Media* (June 15, 1998) at 4; *see also* "Malone pulls switch on DTV," *Broadcasting &Cable* (May 11, 1998) at 10.

123"TCI's Malone Discusses HDTV and Must-Carry at NCTA Convention," *MultiChannel News* (May 11, 1998) at 6 (on-line edition).